1978

Producers Livestock Marketing Association v. Zane Christensen : Plaintiff-Appellee's Brief in Support of Petition for Rehearing

Utah Supreme Court

Ben E. Rawlings; James R. Morgan; Attorneys for Respondent;
R. Earl Dillman; Brant H. Wall; Attorneys for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a Utah Cooperative Association,	)	
Plaintiff-Respondent.	)	
vs.	)	CASE NO. 15388
ZANE CHRISTENSEN,	)	
Defendant-Appellant.	)	

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PLAINTIFF-APPELLEE'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

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On Appeal from a Judgment of the District Court of Davis County, The Honorable J. Duffy Palmer, District Judge

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a Utah cooperative association, Plaintiff - Respondent. vs. ZANE CHRISTENSON, Defendant - Appellant.	CASE NO. 15388

PETITION FOR REHEARING

Producers Livestock Marketing Association, plaintiff-appellee herein, pursuant to the terms of Rule 76(e), Utah Rules of Civil Procedure, petitions the court for rehearing of the above matter. Plaintiff-appellee respectfully submits that the court erred in its decision filed on November 27, 1978 in the following particulars:

1. The decision herein that a joint venture continued between the parties is based on disputed facts not preponderating against the lower court's findings. Therefore, reversal would

be an inappropriate usurpation of the trial court's discretion.

2. The record does not support a finding of joint venture in the feeding of the cattle.

3. The direction of the plurality opinion to adjust the loss between the parties cannot be followed because the record is unclear as to how apportionment is to be made.

Respectfully submitted this 18th day of December, 1978.

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By James R. Morgan

CERTIFICATE

True and correct copies of the Plaintiff-Appellee's Brief in Support of Petition for Rehearing and Petition for Rehearing were hand delivered to

R. EARL DILLMAN and
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this 13th day of December, 1978.

By James R. Morgan

IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a Utah Cooperative Association,	)	
Plaintiff-Respondent.	)	CASE NO. 15388
vs.	)	
ZANE CHRISTENSEN,	)	
Defendant-Appellant.	)	

PLAINTIFF-APPELLEE'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF THE CASE

Plaintiff, Producers Livestock Marketing Association, filed a two-count complaint against the defendant, Zane Christensen, to recover moneys paid to defendant on drafts drawn on plaintiff by defendant. Defendant answered the complaint admitting receipt of the money but, by way of counterclaim, sought a set-off and accounting on five specific business transactions.

The case was tried in the District Court, sitting without a jury, and judgment was rendered to plaintiff on each count of the complaint. The trial court denied recovery on all counts of defendant's counterclaim except one, which is not before this court on appeal. Defendant appealed. On November 27, 1978, this court, in a divided opinion, reversed the judgment on Count I of defendant's counterclaim, finding that the parties had been

joint venturers in a cattle purchase which resulted in a substantial loss and that plaintiff should share in the loss.

The record herein reveals that plaintiff is a cooperati livestock marketing association and that defendant, in additic to being an extensive cattle owner and dealer, since 1948 had been associated with plaintiff in the purchase and sale of cat (TR 26-28; 122-125). That association included not only buyin and selling cattle to each other, or on a commission basis, bu also joint venturing together on cattle transactions (TR26-28, 122-125; 140-143).

The subject of the counterclaim filed by defendant and the plurality's opinion was the purchase of approximately 230 head of calves from the Ute Tribal Livestock Association in 1 In that transaction, a three-way partnership was formed betwee plaintiff, defendant and a third party. The cattle were purch but due to the high purchase price and falling cattle market, cattle could not be sold without sustaining a loss. Therefore the three-way partnership ended and Waitt Cattle Company purc 994 head reimbursing plaintiff a proportionate share of the pu chase price (TR 54; 279). Thereafter, the decision was made place the balance of the cattle in a feedlot in Delta, Utah. cattle were subsequently repurchased with a loss on the total transaction of approximately $210,000.00 (TR 54-56, 61-62, 6 159-161).

The trial court found that defendant acted alone in pl

the cattle in a feedlot and therefore plaintiff was not liable for a partnership share of the loss sustained. The plurality opinion reverses the trial court's finding and in substitution thereof, finds inter alia that a joint venture continued between the parties and that plaintiff should share in the loss in the same proportion that over the years the parties had split gains.

Plaintiff-Appellee moves for rehearing, respectfully urging that the plurality opinion reversing the trial court's decision was in err because it is based upon disputed facts not clearly preponderating against the trial court's findings and therefore, a reversal would be an inappropriate usurpation of the trial court's discretion. Further, if the plurality opinion is left standing, it would create serious inconsistencies in the law of joint venture and of appellate review.

ARGUMENT

THE DECISION HEREIN THAT A JOINT VENTURE CONTINUED BETWEEN THE PARTIES IS BASED ON DISPUTED FACTS NOT PREPONDERATING AGAINST THE LOWER COURT'S FINDINGS. THEREFORE, REVERSAL WOULD BE AN INAPPROPRIATE USURPATION OF THE TRIAL COURT'S DISCRETION AND A REHEARING SHOULD BE GRANTED.

Long standing legal precedence in this jurisdiction holds, in an equity case, that the trial court's findings will not be disturbed "unless as a matter of law. . . no one could reasonably find as did the fact finder." Canesecca vs. Canesecca, 572 P.2d 708 (1977). The obvious reason for such precedence is the unique position of the trial court in hearing testimony and receiving

evidence. Nokes v. Continental Mining and Milling Co., 6 Uta 2d 177, 178; 308 P.2d 954, 955 (1957).

The majority opinion reverses the trial court based upo the oral testimony of the defendant and a witness, J. L. Linds (Lindsay), whose testimony the trial court found to be unrelia The record reveals many inconsistencies and bias which suppor the trial court's rulings.

1. There is evidence that the witness, J. L. Lindsay, was prejudiced against the plaintiff. The record reflects tha Lindsay was fired from plaintiff's employ because he would no follow plaintiff's management directives (TR 220-224). That disregard for plaintiff's directives was clearly evidenced in Lindsay's failure to obtain management approval for feedlot operations and Lindsay's refusal to clean up cattle transactio to avoid the very type of transaction at issue (TR 149-154, 2 224). It seems rather clear that if Lindsay disregarded his employer while employed, that he would be hostile to his emp after being fired.

2. There is evidence that the witness, J. L. Lindsay, interested in the outcome of the litigation because of his con ing business relationship with defendant. There is ample evi in the record that Lindsay was interested in the outcome of t litigation because he continues to do business with defendant (TR 28, 103-104, 129, 138, 167-168). Lindsay and defendant t fied that they had personal dealings as well as dealings thr

third party, Waitt Cattle Company.

3. Lindsay's testimony was inconsistent and impeached on several points which were germane to defendant's theory of partnership. During cross-examination Lindsay displayed an inability to recall specifics of the cattle transaction in question or incredible inability to clarify deal sheets even though the record reveals that Lindsay supervised the deal sheet preparation (TR 128-130, 131, 152-154), the most significant of which was Lindsay's inability to identify the ultimate sale of the cattle to Wheatheart (TR 158-162).

Lindsay's testimony was also clearly impeached on several specific points. Pressing Lindsay as to why the deal sheet in question did not reflect an ongoing transaction, Lindsay incredibly explained that the deal had been "cleaned up" but that plaintiff would participate in the buy back (TR 130, 148-160). This testimony was directly in conflict with that of Joe Jacobs, general manager for plaintiff, who testified that a "cleaned up deal" meant that it was a totally completed transaction (TR 219-220).

Similarly, Lindsay testified that there was an agreement with defendant to repurchase the subject calves but his statements to plaintiff's personnel were in direct conflict and impeached. Significantly, Lindsay's position reversed as soon as he was no longer employed by plaintiff but maintaining a business relationship with defendant (TR 208-210).

In light of the foregoing, it cannot be said that the trial court's finding as a matter of law was so devoid of supp that reasonable men could not have found as the trial court di and therefore, rehearing should be granted.

II. THE RECORD DOES NOT SUPPORT A FINDING OF JOINT VENTURE IN THE FEEDING OF THE CATTLE AND THEREFORE REHEARING SHOULD BE GRANTED.

The majority opinion found as follows:

> "A joint venture should remain joint whether it results in a gain or in a loss, unless the parties otherwise contract. The record does not reveal any contract other than a joint venture."(Slip Op.4)

This court in Bassett v. Baker, 530 P.2d 1 (Utah 1974), set forth the standard for a joint venture as follows:

> "The requirements for the (joint venture) relationship are not exactly defined, but certain elements are essential: The parties must combine their property, money, effects, skill, labor and knowledge. As a general rule, there must be a community of interest in the performance of the common purpose, a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits and unless there is an agreement to the contrary a duty to share in any losses which may be sustained." Id. at

1. The defendant acted alone in placing the cattle in a feedlot. Clearly, at the point that the decision is made to pl the cattle in a feedlot, there is not evidence supporting a fi of joint venture. There is evidence and the trial court found partnership in the purchase. However, after the cattle were p chased, it is clear that that partnership was terminated, wit Waitt Cattle Company purchasing approximately one-half of the cattle. Significantly, impeaching testimony in the record rev

that the one-half of the head purchased by Waitt was the plaintiff's half and the defendant took his share to a feedlot (TR 206-207). At that point there was not "a combination of property, money, effects, skill, labor and knowledge", because the record reflects that defendant acted along from that point as evidenced by the following facts:

(a) Defendant alone contacted the operators of the feedlot and plaintiff was not represented during the negotiations.

(b) The written feedlot agreement was between defendant and the feedlot operators, with no mention that plaintiff had an interest in the cattle.

(c) Defendant arranged for and paid the freight on the calves to and from the feedlot out of his own funds.

(d) Defendant arranged for and paid the balance of the purchase price on March 30, 1974 approximately two and one-half months before the transaction was actually completed.

(e) Defendant comingled the calves with his own calves in the feedlot and maintained part of the calves on his own ranch even though the balance could have been liquidated through plaintiff's auction (TR 53-66, 110-113, 238-245).

Clearly, there was no combination of property, money, skill, labor

or knowledge in the transaction required in a joint venture a
the trail court rightly held that defendant acted alone in pl
the cattle in a feedlot.

2. There is evidence in the record of a contract of s
to defendant. The plurality opinion states that there is no e
dence of any contract except a joint venture. However, the t
court noted with interest the 1972 Ute Indian deal wherein a
portion of the calves purchased were placed in inventory and
subsequently paid for by defendant with no accounting for pro
even though it had been a profitable market (TR 274-278). It
also evident that the defendant purchased cattle from plainti
on his own account and that there was an ongoing customer re
tionship between the parties as well as the partnership (TR 2
267-270, 272, 281). In light of the defendant' failure to ac
for profits on the 1972 transaction, it becomes questionable
whether defendant would have voluntarily reopened the "cleane
deal" had there been a profit realized on the 1973 transacti

Perhaps the most helpful testimony on plaintiff's lega
responsibility to share in the loss was Lindsay's own testim
which, read in context, reveals that plaintiff's obligation w
more a moral than legal obligation when he stated in respons
the following question:

> Q. Now, it was your testimony that there would be a settling up at some point because you wanted to help Zane recoup his losses, is that correct?

A. I said there would be a settling up because I felt like we had participated in enough profit in all the other years and all other deals that we should participate in this one also. (TR 158)

Because of defendant's own independent operation and the fact that he acted alone on all critical points of the feedlot phase of the transaction, a rehearing should be granted.

III. THE DIRECTION OF THE PLURALITY TO ADJUST THE LOSS BETWEEN THE PARTIES CANNOT BE FOLLOWED BECAUSE THE RECORD IS UNCLEAR AS TO HOW THE ADJUSTMENT IS TO BE MADE.

1. The testimony is unclear as to how an adjustment for losses should be made. Testimony in the record is in conflict as to how the losses should be divided. Significantly, the testimony in conflict is between the two individuals upon which the plurality bases its opinion. Defendant testified that profits were divided approximately equally after taking out weighing charges, feed costs, freight charges, and that the decision was made between himself and Lindsay (TR 46-47, 94-95). However, Lindsay testified that all these factors, including interest costs, would enter into his decision on defendant's split and that on occasion defendant had nothing coming (TR 133, 135-136, 141-143, 163, 165). Of particular importance is the testimony of Lindsay concerning how they allocated losses. On this point Linday testified as follows:

Q. Have you, in your other course of dealings had any transactions that sustained a loss?

A. Oh, yes.

Q. And what would happen in those instances?

A. Well, sometimes we would pay and sometimes we would carry it on. We had 25 years of good business relationship and it wasn't too many times that we hadn't gotten even.

Q. Were there many times that you had taken a loss of profits.

A. Not too darn many.

Q. And were there instances where you would carry them on for a period of time just as you were suggesting here?

A. Yes, yes.

Q. And work them out?

A. Yes (TR 133).

Thus, it is clear that the parties would attempt to rec losses in subsequent transactions. A requirement that the tri court apportion the losses cannot be done from the record beca at least one year of transactions occurred between the parties during which time much or all of the loss could have been equa as evidenced by the Wheatheart transaction in the record where defendant received approximately all of the profit (TR 161).

2. Any loss apportioned to plaintiff should be the los incurred at the time the cattle were placed in a feedlot. Pl tiff's position is that there should be no apportionment of t loss. However, because neither majority or minority opinions

address this issue, the following should be submitted to assist the trial court in apportioning the loss.

It is clear that defendant and Lindsay, in placing the cattle in the feedlot, were acting in direct contravention of management directives because no authorization was obtained for the feedlot operation and Lindsay was being pressured to clear off any inventory (TR 148-151, 211-215). It seems inconceivable that over the course of many years and thousands of transactions defendant would be unaware of those directives.

If, however, defendant was unaware of the authorization requirement, Utah law would impute such knowledge to defendant. See: Section 48-1-9, Utah Code Annotated (1953).

During the course of the trial, plaintiff submitted evidence through its accountant that had the cattle been sold just after purchase, there would have been a loss sustained. By using the sale of a larger number of less desirable cattle approximately equal weights, the accountant computed that the loss which would have been sustained would have approximated $124,000.00 instead of the nearly $210,000.00 loss actually sustained (TR 283-289).

Plaintiff submits that if the court is inclined to apportion loss, it should be that loss sustained when the three-way partnership was terminated and not the loss incurred as a result of the feedlot operation over which it had no actual control.

CONCLUSION

The record contains disputed facts which do not clearly

preponderate against the trial court's findings, and therefore plaintiff respectfully urges that rehearing be granted.

DATED this 18th day of December, 1978.

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